Supreme Court, U.S.
FILED

No. 01-___ 011068 JAN 14 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES HENDERSON,

Petitioner,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL S. ROTHSTEIN
626 N.E. First Street
Gainesville, FL 32601

FRANK H. TOMLINSON
PRITCHARD, MCCALL & JONES, LLC
800 Financial Center
Birmingham, AL 35203

ROBERT P. CUMMINS
THOMAS C. CRONIN, JR.
(Counsel of Record)
CUMMINS & CRONIN, LLC
77 West Wacker Drive, Suite 4800
Chicago, IL 60601
(312) 578-0500

January 14, 2002

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

458

QUESTION PRESENTED

In this case, petitioner objected in the district court to the approval of a class action settlement in which he is an absent class member upon whom the settlement purports to have binding effect. The district court approved the settlement. Thereafter, the Eighth Circuit dismissed petitioner's appeal of the district court's approval order for lack of jurisdiction, on the ground that petitioner was not an intervenor. On December 10, 2001, this Court granted certiorari in *Devlin v. Scardelletti*, No. 01-417, which presents the same issue presented in this petition: whether an absent class member must be an intervenor to have "standing" to appeal from approval of a class action settlement. The question presented is:

> Whether a class member, who upon receiving notice of a proposed class action settlement, files timely objections and moves to intervene, has standing to appeal the district court's approval of the settlement even though intervention is denied and he is therefore not an intervenor on appeal.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner James Henderson was an appellant below in the consolidated appeal. The respondents in this Court, appellees below, are: William P. Ludwig, Jeffery L. Sippil, Darrell D. Cunningham, John R. D'Alessandro, Bobby L. Chain, Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities, and General American Life Insurance Company.

Other persons named in the court of appeals' caption, but who are not respondents here, are: Lewis & Ellis, Inc., Karen Shapiro, Carl Kelly Paving, Inc., William Boje, Katherine Zoghby, Gloria Boje, Carol Singley Carroll, L. Henry Gissel, Jr., Preston Reeves, Dennis Lindsey, Ross J. Love, Jr., James L. Carroll, James N. Dickson, Howard Patterson, Charles E. Patterson, Pat's Auto Parts, Inc. Rahernat Amarshi, Amin Amarshi, Cynthia Stanley, Billy McNurlen, Patricia McNurlen, Mary Lewis, Gregory Harris, Jack Leinenweber, Roger E. White, Trustee, Oliver Kitchens Family Trust, David Garrett, William Gabriel, Sule Alli, Thomas Crovella, Larry Morris, Charles Hoskins, George Linsey, Oliver Kitchens, Tommy Rogers, Betty Rogers, George Moore, Jon French, and Dr. Lindsey Jones, Jr.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTE INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 7
CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Carlough v. Amchem Prods., 5 F.3d 707 (CA3 1993) 8

Cook v. Powell Buick, Inc., 155 F.3d 758 (CA5 1998) 7

Devlin v. Scardelletti, No. 01-417 2

Gottlieb v. Wiles, 11 F.3d 1004 (CA10 1993) 8

Guthrie v. Evans, 815 F.2d 626 (CA11 1987) 8

Kaplan v. Rand, 192 F.3d 60 (CA2 1999) 8

Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (CA9 1977) 8

Marino v. Ortiz, 484 U.S. 301 (1988) 7

In Re Synthroid Mktg. Litig., 264 F.3d 712 (CA7 2001) 8

Scardellitti v. Debarr, 265 F.3d 195 (CA4 2001), *cert. granted*, 122 S.Ct. 663 (Dec. 10, 2001) 7

Shults v. Champion Int'l Corp., 35 F.3d 1056 (CA6 1994) 8

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 2

RULES

Fed. R. Civ. P. 24(a) 6

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

James Henderson, the petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-titled case on October 16, 2001.

OPINIONS BELOW

Petitioner seeks to appeal a judgment approving a class action settlement. The district court's order denying petitioner's motion to intervene, approving the settlement, and entering a final judgment is unpublished. The October 16, 2001 opinion of the Eighth Circuit Court of Appeals (per Bye, J., joined by Bowman, J., and Morris Sheppard Arnold, J.), holding that petitioner's appeal was due to be dismissed because he did not challenge the denial of the motion to intervene on appeal and thus lacked standing, is reported at 268 F.3d 627 and is reprinted in the separate Appendix to this Petition. Pet. App. 1-17.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 28 U.S.C. § 1291, which provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * ."

STATEMENT OF THE CASE

It is undisputed that if objectors need not be intervenors to have appellate "standing" to appeal approval of a class action settlement, the Eighth Circuit would have reached the merits of petitioner's appeal rather than dismissing his appeal for lack of jurisdiction. That very question is now before the Court in *Devlin v. Scardelletti*, No. 01-417. Therefore, the Court should hold this petition pending the outcome in *Devlin*, and then dispose of the petition accordingly.

This petition arises from a class action lawsuit. Respondents are the named representatives of the class as well as the Defendant company. Respondents have agreed among themselves to settle the lawsuit.

Petitioner is a member of the Plaintiff class who sought to intervene in the suit to oppose the proposed settlement. Petitioner also filed timely objections to the settlement. The district court, however, denied the Petitioner's motion to intervene, rejected his objections, and approved the settlement.

The question presented is whether Petitioner may appeal the district court's approval of the settlement without appealing the denial of the motion to intervene.

The Eighth Circuit held that Petitioner did not have standing to appeal because he was not an intervenor (precisely the ruling currently before this Court in *Devlin*).

The suit underlying this petition involves three class actions filed against respondent GALIC, between February 5, 1996 and June 26, 1997. The three cases were consolidated by the Panel on Multidistrict Litigation in 1997 and transferred to the District Court for the Eastern District of Missouri for resolution of common pretrial proceedings. Petitioner is a member of the class of persons who purchased universal life insurance policies from GALIC between 1982 and 1996, and those who purchased whole life insurance policies from GALIC between 1984 and 1996.

Plaintiffs in the class actions generally alleged that GALIC had fraudulently manipulated dividend scales, interest rates, and related actuarial factors allowing it to misrepresent to its customers: the cash value and the benefits of the policies; the cost to the customer of canceling an existing policy and purchasing a new policy, otherwise known as "churning"; that after a certain number of years, no out-of-pocket premiums would be due from the customer, commonly known as a "vanishing" premium policy; and that the policy was actually an investment or retirement plan rather than a life insurance policy.

Respondents agreed among themselves to settle the class action cases and the district court certified a plaintiff class for purposes of the settlement agreement on August 28, 2000. The settlement agreement provides an

estimated value of $55 million in benefits to approximately 251,000 class members, or an average of $219.12 in benefits per class member. Under the settlement agreement, a class member could choose to take part in a Claim Evaluation Process ("CEP"), or if the class member chose not to participate in the CEP or made no choice, the class member would receive General Policy Relief. A class member was eligible to receive a cash award only under the CEP.

General Policy Relief ("GPR") provides automatic limited relief in the form of insurance benefits to class members who chose GPR and those who fail to make a choice. For class members with outstanding policies, GPR provides interest and mortality benefits on their existing policies. For class members who no longer have outstanding policies GPR provides relief in the form of a Contributed Insurance Benefit, which is similar to term life insurance.

Class members who elect to participate in the Claim Evaluation Process ("CEP") must submit a claim to a Claim Evaluator, who is chosen by respondent's class counsel. The claim includes a Claim Form, in which the class member details how he was misled by GALIC. Along with the Claim Form, the class member must submit documents supporting his claim, including statements of other persons who have knowledge of the circumstances surrounding the claim. In response to the class member's claim, GALIC submits documents, presumably to contradict the claim of the class member.

Once the Claim Evaluator receives the claim, he determines the merit of the claim and places it accordingly into one of four categories having a number score of zero to three. The amount of relief a class member will receive under this plan, varies from full relief with a score of three to no relief with a score of zero.

The Claim Evaluator is given objective criteria as to what score a particular claim deserves based on the evidence presented. However, the Claim Evaluator is given complete discretion to assign any score, that he thinks the claim otherwise deserves.

Under this settlement agreement, a class member may only receive full cash relief if the class member chooses to risk receiving little or no relief choosing to participate in the CEP. In addition to the disincentive the class member has to choose the CEP due to the risk of no relief, the class member is discouraged from pursuing cash relief because of the apparent time investment required to prepare a claim and the tremendous uncertainty as to the outcome of the CEP due to the amount of discretion given to the Claim Evaluator. Furthermore, the Claim Evaluator's decision is final in all respects and is not subject to any form of review.

Under the settlement agreement, a class member is led to accept limited relief under GPR rather than pursuing his claim under the CEP for what the class member rightfully believes he is owed. Under the agreement, choosing to avoid the risk of receiving no relief under the CEP while expending no effort in accepting GPR is the only logical decision for a class member to make.

Shortly after learning of the terms of the proposed settlement, petitioner filed timely objections and moved to intervene as a party pursuant to Fed. R. Civ. P. 24(a). Petitioner objected to the proposed settlement on two grounds: first, the existence of a zero score is unfair to class members and serves to discourage class members from pursuing their claims for full relief; and second, the settlement language unnecessarily gives the Claim Evaluator complete discretion in determining the score that a particular claim receives, further serving to discourage class members from pursuing their claims.

On December 19, 2000, the district court denied petitioner's motion to intervene and approved the settlement over his objections. The court did not believe "it is necessary for [it] to attempt to order renegotiation of the settlement agreement." Pet. App. 19. The court stated that the settlement agreement was "fine in its current form," and accordingly overruled petitioner's objections and ordered final approval of the agreement as negotiated. Pet. App. 19.

Petitioner appealed the district court's order to the United States Court of Appeals for the Eighth Circuit, and on October 16, 2001, that court dismissed petitioner's appeal for lack of jurisdiction because he had not become an intervenor in the district court.

The Court of Appeals relied on prior Seventh and Eighth Circuit precedent in holding that a class member who objects and tries to intervene does not have standing to appeal the merits of a settlement unless he has actually intervened. Pet. App. 9. The Court of Appeals interpreted this Court's three-paragraph per curiam opinion in

Marino v. Oritz, 484 U.S. 301 (1988), to support its holding. The court cited *Marino* for the proposition that, " '[a]bsent' class members – those who are not named representatives of the class – may not appeal from a settlement approved by a district court because they are not (strictly speaking) parties to the action." Pet. App. 8. *Marino*, however, involved an attempt to appeal a judgment by persons who were neither named parties *nor class members*, as is the case with petitioner.

The court, thus, implicitly rejected the view of Second and Third Circuits that *Marino* is properly distinguished from facts such as the ones in this case because *Marino* did not involve a class member who was objecting to a settlement. In dismissing petitioner's appeal, the court apparently disagreed with the Second, Third and Ninth Circuits which broadly permit non-named class members to appeal the merits of a class settlement when the class member objects and moves to intervene in the district court, even though the class member was not permitted to intervene. Again this is the similar issue that is now before the Court in *Devlin v. Scadelletti*, 01-417.

REASONS FOR GRANTING THE WRIT

There is no reason to repeat all the arguments from *Devlin* since they have already been taken by this Court. The Circuits are divided on this important question of Federal Law. In the instant case, the Eighth Circuit remained in line with the Fourth Circuit (*Scardellitti v. Debarr*, 265 F.3d 195 (CA4 2001), *cert. granted*, 122 S.Ct. 663 (Dec. 10, 2001), the Fifth Circuit (*Cook v. Powell Buick, Inc.*,

155 F.3d 758, 761 (CA5 1998)), the Sixth Circuit (*Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1061 (CA6 1994)), the Tenth Circuit (*Gottlieb v. Wiles*, 11 F.3d 1004, 1008-09 (CA10 1993)), and the Eleventh Circuit (*Guthrie v. Evans*, 815 F.2d 626, 628-29 (CA11 1987)), on the Federal question of whether intervention must be obtained by non-named class member who objects to a class action settlement in order to give that member standing to challenge an order approving such settlement. In direct contrast, the Second Circuit (*Kaplan v. Rand*, 192 F.3d 60, 67 (CA2 1999)), the Third Circuit (*Carlough v. Amchem Prods.*, 5 F.3d 707, 710 (CA3 1993)), and the Ninth Circuit (*Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (CA9 1977)) do not require such a procedural hurdle of a class member. The Seventh Circuit takes a more middle-of-the-road approach in that it requires that a motion to intervene be filed, but as a matter of course said motion should be granted by the district court in order to protect the objecting class member's right to appeal any such order finding a settlement to be fair, reasonable and adequate. *In Re Synthroid Mktg. Litig.*, 264 F.3d 712 (CA7 2001). Such conflict in the Circuits needs to be resolved. The Court has acknowledged the need for resolving this split by its grant of certiorari in *Devlin*. We ask only that this petition be held and then resolved in a manner consistent with *Devlin*.[1]

Furthermore, it is a denial of due process to invite absent class members to file objections to binding settlements and then to establish procedural obstacles that

---

[1] If for some unusual reason the Court is ultimately unable to resolve the question presented in *Devlin*, then we ask that the Court grant this petition for plenary review.

preclude any appeal of the district court's finding approving the settlement. Once a settlement is approved, *res judicata* prevents an absent class member the right to further challenge the transaction which is the basis of the class action settlement. Class members' stake in such litigation may be so minimum that to opt out makes no sense; such class members should not be procedurally barred from filing an appeal. Otherwise, the class member is being denied his day in court.

CONCLUSION

The petition should be held pending this Court's decision of *Devlin* and then disposed of in a manner consistent with that decision; otherwise the Court should grant the petition for plenary review.

Respectfully submitted,

PAUL S. ROTHSTEIN
626 N.E. First Street
Gainesville, FL 32601

FRANK H. TOMLINSON
PRITCHARD, MCCALL & JONES, LLC
800 Financial Center
Birmingham, AL 35203

ROBERT P. CUMMINS
THOMAS C. CRONIN, JR.
(Counsel of Record)
CUMMINS & CRONIN, LLC
77 West Wacker Drive,
Suite 4800
Chicago, IL 60601
(312) 578-0500

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1264

In re: General American Life Insurance Company Sales Practices Litigation Lewis & Ellis, Inc., Karen Shapiro, Movants, James Henderson, Appellant, William P. Ludwig; Jeffrey L. Sippil; Darrell D. Cunningham; John R. D'Alessandro; Bobby L. Chain; Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities, Appellees, v. General American Life Insurance Company, Appellee.	Appeals from the United States District Court for the Eastern Distict of Missouri [TO BE PUBLISHED]

No. 00-1453

William P. Ludwig; Jeffrey L. Sippil; Darrell D. Cunningham; John R. D'Alessandro; Bobby L. Chain; Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities,

Plaintiffs,

Carl Kelly Paving, Inc.; William Boje; Katherine Zoghby; Gloria Boje; Carol Singley Carroll; L. Henry Gissel, Jr.; Preston Reeves; Dennis Linsey; Ross J. Love, Jr.; James L. Carroll; James N. Dickson; Howard Patterson; Charles E. Patterson; Pat's Auto Parts, Inc.; Rahernat Amarshi; Amin Amarshi; Cynthia Stanley; Billy McNurlen; Patricia McNurlen; Mary Lewis; Gregory Harris; Jack Leinenweber; Roger E. White, Trustee, Oliver Kitchens Family Trust; David Garrett; William Gabriel; Sule Alli; Thomas Crovella; Larry Morris; Charles Hoskins; George Linsey; Oliver Kitchens; Tommy Rogers; Betty Rogers;

George Moore; Jon French; Dr. Lindsey Jones, Jr.,

Appellees,

v.

General American Life Insurance Company,

Appellant.

Submitted: September 14, 2001
Filed: October 16, 2001
(Corrected 10/22/01)

Before BOWMAN, MORRIS SHEPPARD ARNOLD, and BYE, Circuit Judges.

BYE, Circuit Judge.

These consolidated appeals stem from a nationwide class action settlement between General American Life Insurance Company (GALIC) and more than 240,000 current and former policyholders. The policyholders claimed that GALIC committed fraud and made material misrepresentations in the course of selling certain life insurance policies. GALIC agreed to pay at least $55 million to class members in the form of additional policy benefits.

In appeal 01-1264, James Henderson challenges the district court's[1] conclusion that the settlement fairly rewards the class. We dismiss his appeal for lack of

---

[1] The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

jurisdiction. In appeal 01-1453, GALIC appeals from the district court's order permitting several class members who tendered arguably defective opt-out requests to be excluded from the class. We affirm.

I

In May 1997, the Judicial Panel on Multidistrict Litigation consolidated three policyholder actions filed against GALIC in various federal district courts. The Panel transferred the consolidated cases to the Eastern District of Missouri to resolve common pretrial proceedings. The consolidated class of plaintiffs in the Eastern District of Missouri included those who purchased GALIC whole life insurance policies between 1984 and 1996, and those who bought GALIC universal life insurance policies between 1982 and 1996.

The class of plaintiffs pursued several claims against GALIC. The class alleged that GALIC sold "vanishing premium" policies by misrepresenting that a policyholder's premium payments would cease over time, when, in fact, additional premiums would be required. In addition, the class alleged that GALIC "churned" policies by persuading policyholders to remove the cash value or assets of their existing life insurance policies to acquire replacement policies. The class also alleged that GALIC misrepresented to policyholders that some of its policies were actually investments, not life insurance.

GALIC and class counsel negotiated a settlement and presented a Stipulated Agreement to the district court on August 24, 2000. The district court provisionally accepted the Agreement in an August 28, 2000 order. In that order,

the district court required GALIC to notify all known class members of the proposed settlement by mail and to publish notice of the settlement in 13 national and regional newspapers. GALIC was ordered to advise class members of their rights to opt out of the proposed settlement to pursue individual lawsuits. GALIC was also required to inform class members of a December 15, 2000 hearing at which the district court would entertain objections to the settlement and consider its overall fairness, *see* Fed.R.Civ.P. 23(d)(2), (e).

The district court established precise procedures for GALIC policyholders who desired to opt out of the class.

> Any Class Member who wishes to be excluded from the Class must send a written request for exclusion to the Clerk of the Court at the address provided in the Class Notice and Publication Notice. Any such exclusion request must be sent by first-class mail, postage prepaid, and must be postmarked no later than November 8, 2000 (*i.e.*, 35 days before the date of the Fairness Hearing . . .). Exclusion requests must specify the particular Policy or Policies the Class Member wishes to exclude from the Class. If the proposed settlement is approved, any Class Member who has not submitted a timely and properly written request for exclusion from the Class for a particular Policy shall be bound as to that Policy by all subsequent proceedings, orders and judgments in these Actions. . . .

Appellant's App. 267. Class members seeking to opt out of the class were required to write to a claims processing center in Minneapolis, Minnesota established during the class action. They were ordered to send signed letters and

to provide background information such as addresses, phone numbers, and GALIC policy numbers.

After the November 8, 2000 opt-out deadline passed, GALIC objected to numerous requests for exclusion that failed to comply with the district court's order.

- Twenty-nine class members (representing 47 GALIC policies) had filed opt-out letters that were received in Minneapolis on November 10, 2000, two days after the postmark cut-off date. Each envelope bore a postmark containing the month and year (November 2000), but none of these postmarks recorded a date, so it cannot be determined when these class members mailed their letters. Most of these letters were mailed by an Alabama law firm using its own postage meter, prompting GALIC to hypothesize that the law firm purposefully omitted the date on which the letters were mailed to obscure their tardy filing.

- Six other class members (representing 7 GALIC policies) neglected to sign their letters personally. One such class member hand-wrote her opt-out request and printed her name. In the case of the remaining five class members, an attorney prepared the members' opt-out requests and signed his own name.

- Finally, GALIC asserted that one class member failed *both* to postmark his opt-out letter with a particular date in November 2000 *and* to sign his letter. The class member's Pennsylvania lawyer submitted and signed his opt-out letter.

Class counsel urged the district court to deem the ostensibly tardy opt-out letters to be timely filed. Lawyers for the class proposed that letters received November 10 in Minneapolis must have been postmarked no later than November 8 in Alabama. Class counsel also argued that attorneys were entitled to sign opt-out letters on behalf of their clients. Though class counsel offered no explanation or excuse for class members' apparently defective filings, counsel urged the district court to permit class members to cure any defects by submitting corrected requests for exclusion from the class.

The district court acknowledged that the class members "failed to comply with all the technical requirements of the class notice for [opting out]." Appellant's Add. 3. Despite the evidence of non-compliance, however, the court evaluated the class members' violations and determined that the "interests of justice" required their exclusion from the class. As to the ostensibly tardy opt-out requests, the court found that "from the evidence before me, I believe they were timely mailed." *Id.* Over GALIC's objections, the district court permitted these class members to opt out of the class settlement.

The district court formally approved the parties' settlement in the same order that permitted class members to opt out of the class. Under the terms of the settlement, a class member could accept a lump sum payment (in policy benefits) or choose to pursue the possibility of greater relief through a claims-processing system operated by plaintiffs' lead counsel. Class members choosing the latter option would have their claims scored by qualified claims processors based upon the extent of their losses and proof of GALIC wrongdoing. The scoring

ranged from "three" (meriting the greatest relief) to "zero." GALIC describes a zero score as a sanction for rogue class members who present manifestly frivolous claims in cases where clear evidence demonstrates that GALIC acted properly. Zero scorers would not receive compensation from the settlement fund.

Henderson objected to the very existence of a zero score. He believed that the mere possibility – however remote – that a class member could receive no compensation was unfair. He moved to intervene in the district court and pressed this scoring objection as a reason for rejecting the proposed settlement struck by GALIC and class counsel. The district court overruled Henderson's objection and denied his motion to intervene in the action.

II

Henderson challenges the merits of the class settlement, but his challenge is quickly derailed by a jurisdictional impediment. Henderson neglected to establish party status in the district court, and he does not contest the district court's order denying him the status of a party on appeal. Because he is not a party, we dismiss his appeal for lack of jurisdiction.

"Absent" class members – those who are not named representatives of the class – may not appeal from a settlement approved by a district court because they are not (strictly speaking) parties to the action. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). An absent class member who objects to a settlement's fairness must first intervene in the district court, *see* Fed. R. Civ. P. 24,

and achieve the status of a party before challenging the settlement on appeal. *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992) ("We believe it is particularly appropriate to require intervention as a condition for appeal when a class member's challenge to the adequacy of a settlement is contrary to the view of all the other class members."). If the district court denies a class member's motion to intervene, the class member must successfully challenge the district court's denial of intervention on appeal to become a "party" entitled to contest the fairness of a class settlement. *Cf. B.H. v. Murphy*, 984 F.2d 196, 199-200 (7th Cir. 1993) (suggesting that an appellant who successfully challenges a district court's denial of intervention would be accorded party status).

Henderson is an absent class member, and so he is not a party entitled to appeal from the judgment entered by the district court. He moved to intervene in the district court in an effort to be recognized as a party, but the district court denied his motion as part of its omnibus December 2000 order. If Henderson contested the district court's denial of intervention, and we reversed, Henderson would be accorded party status, and he could then challenge the fairness of the class settlement.

In this instance, however, Henderson has not challenged the validity of the district court's order denying his motion to intervene. Henderson devotes the entirety of his brief to arguing the merits of the settlement, an issue we may not reach until we first decide that Henderson is a party (i.e., that he should have been permitted to intervene in the district court). Henderson neglects to identify the intervention question as an issue in his Statement of Issues, and he does not even mention the word

"intervene" in his brief. By failing to raise the intervention issue, Henderson has waived the issue and effectively conceded his non-party status. He is therefore ineligible to challenge the district court's determination that the class settlement is fair. *See Marino*, 484 U.S. at 304 ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.").

In a reply brief, Henderson asserts that he did challenge the denial of intervention by designating the district court's December 2000 order in his notice of appeal. This contention misses the mark. For starters, "[i]t is well established that issues not argued in an opening brief cannot be raised for the first time in a reply brief. . . . " *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881 (8th Cir.), *petition for cert. filed*, No. 01-521 (Sept. 24, 2001). Even if we consider the argument in Henderson's reply brief, however, we remain unpersuaded. Henderson confuses an appellant's obligation to preserve issues for appellate review by designating them in a notice of appeal, *see* Fed. R. App. P. 3(c), with the requirement that an appellant explain and develop those issues in his brief, *see* Fed. R. App. P. 28(a)(9). Designating a court order in a notice of appeal simply does not suffice to mount a challenge to a district court's decision when an appellant omits all mention of that issue in his brief. Henderson never bothers to explain how, or why, the district court erred in denying him the right to intervene. Yet he is required – at bare minimum – to provide such an explanation. *Cf. United States v. Wadlington*, 233 F.3d 1067, 1081 (8th Cir. 2000) ("We will consider only those contentions which include citations to the authorities and parts of the

record on which appellant relies.") (internal quotations and punctuation omitted), *petition for cert. filed*, No. 01-5228 (July 6, 2001).

In the absence of any argument that the district court improperly denied Henderson the opportunity to intervene in the class action, we conclude that he has waived the issue. He is not a party to the class action, and so he may not appeal the fairness of the settlement accepted by the district court. Accordingly, we dismiss Henderson's appeal.

III

In the second appeal, GALIC argues that the district court erred in permitting several class members to opt out of the class despite failing to follow various formalities specified by the court. We review the district court's decision for an abuse of discretion. *See In re Wirebound Boxes Antitrust Litig.*, 993 F.2d 152, 154 (8th Cir. 1993).

A

We first take up the question of the purportedly tardy opt-out requests filed by 29 class members. As a threshold matter, GALIC contends that these non-compliant class members were obliged to demonstrate "excusable neglect" for failing to comply with the district court's opt-out protocol, a showing these class members did not even attempt.

When a party fails to perform an act required by court order to be done within a specified time, he may convince a federal district court to overlook his untimely

act by demonstrating "excusable neglect." *See, e.g.*, Fed. R. Civ. P. 6(b), 60(b)(1). Many circuits have applied this standard to untimely opt-out requests, requiring class members to prove that their delay resulted from excusable neglect in order to perfect their exclusion from the class. *In re Paine Webber Ltd. P'ships Litig.*, 147 F.3d 132, 135 (2d Cir. 1998); *In re Copley Pharm., Inc.*, No. 96-8054, 1997 WL 767763, at *3 (10th Cir. Dec. 11, 1997); *Grilli v. Metro. Life Ins. Co., Inc.*, 78 F.3d 1533, 1538 (11th Cir. 1996) (per curiam); *Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994); *Williams v. Burlington Northern, Inc.*, 832 F.2d 100, 102 (7th Cir. 1987); *In re Nat'l Student Mktg. Litig.*, 530 F.2d 1012, 1014 (D.C. Cir. 1976); *see also Manual for Complex Litigation, Third* 231 (Fed. Judicial Ctr. 1995) ("The court may, in its discretion, treat as effective a tardy election to opt out. In exercising its discretion, the court should consider the reasons for the delay, whether there was excusable neglect, and whether prejudice resulted.").

We have not explicitly joined those circuits adopting an excusable neglect standard for tardy opt-out requests. But language in one of our earlier cases suggests that we would likely follow suit. *See In re Int'l House of Pancakes Franchise Litig.*, 536 F.2d 261, 263 & n.1 (8th Cir. 1976) (per curiam) (*IHOP*) (finding that a district court did not abuse its discretion in rejecting a class member's belated request to opt out of a class settlement because he failed to provide a reasonable explanation for his tardy filing and appeared to possess an improper motive for opting out after the court-ordered deadline). *IHOP* and the circuit decisions cited above suggest that we should be favorably inclined to GALIC's request that untimely opt-

out requests be judged against an excusable neglect standard. Though we would be inclined to adopt that standard at this juncture, we ultimately find it unnecessary to take that step in this appeal.

Everyone agrees that the excusable neglect standard applies only when a party commits an *untimely* act. Thus, we must first ascertain whether the class members' opt-out requests were timely before we decide whether to embark upon the excusable neglect analysis. GALIC's argument proceeds from the premise that the class members' opt-out requests were filed out of time, but we have reason to question this premise. The evidence of record suggests that the class members' opt-out requests were timely submitted.

We begin with the language of the district court's August 28 order. That order demands that class members desiring to exclude themselves from the class inform the Minneapolis claims processing center by letter postmarked not later than November 8. The order does not condition timely response upon *receipt* of the letter. Rather, the timeliness of an opt-out request is determined by the *postmark date* its envelope bears.

Each disputed opt-out request arrived with a dateless postmark. The postmarks reveal only that the letters were mailed in November 2000. We know that each disputed opt-out letter arrived in Minneapolis on November 10, but we do not know the precise date upon which the postmarks were affixed to their envelopes.

The district court resolved this dispute by finding that these opt-out requests were in fact timely mailed, i.e., that they were postmarked on or before November 8.

See Appellant's Add. 3 ("I believe they were timely mailed."). The court's expressed belief is akin to a finding of fact, which we would not disturb unless it were clearly erroneous. Given the highly deferential standard under which we review the district court's decisions concerning opt-out requests, *Wirebound Boxes*, 993 F.2d at 154 (abuse-of-discretion review), we must afford the court's determination fairly broad latitude in this case.

We are especially reluctant to disagree with the court's expression that the opt-out requests were timely mailed because it rests upon common sense and sound judgment. All but two of the disputed letters were mailed from Mobile, Alabama to the claims processing center in Minneapolis. The other letters originated in Jackson, Mississippi and Pittsburgh, Pennsylvania. It is reasonable to conclude that the time for delivery of regular mail between these cities exceeds one day. Indeed, it would be unreasonable, we think, to assume that the postal service delivers mail more quickly than this during snowy Minnesota winters. Even the Federal Rules of Civil Procedure presume a *three*-day mailing period by affording recipients of documents served by mail that additional period of time in which to respond. Fed. R. Civ. P. 6(e).

If mail delivery exceeded one day, then the disputed opt-out requests must have been timely postmarked (though the marks do not reflect it). The receipt of the disputed opt-out requests in Minneapolis on November 10 implies that the requests must have been postmarked and mailed no later than November 8 – the court-ordered deadline. We therefore accept the district court's determination that the disputed opt-out requests were in fact timely filed. Because we agree that the disputed opt-out

requests were timely, we need not engage in the excusable neglect analysis to which GALIC has invited our attention.

We hold that the district court properly permitted these policyholders to opt out of the class settlement.

B

Finally, we must consider the small group of class members whose opt-out requests GALIC challenges on the ground that they lack the members' signatures. Six of the seven class members who tendered unsigned opt-out requests had their attorneys prepare and sign their opt-out letters. Five of these six class members were represented by an Alabama attorney, Jubal Hamil. The sixth class member was represented by a Pennsylvania attorney, Vincent Longo. The remaining opt-out request was handwritten by an individual whose family-owned corporation held a GALIC life insurance policy.

GALIC points out that the court's order required class members to sign their opt-out requests, and notes that these class members did not do so. The district court agreed with GALIC that these seven class members failed to comply with the literal requirements of the court's order, which asked for a class member's signature, not an attorney's signature or a hand-printed name. GALIC urges us to hold that the district court abused its discretion by overlooking these class members' non-compliance. We decline to do so for two reasons.

First, we are not convinced that these class members violated the court's order. We acknowledge that the order

required class members to sign their own opt-out letters and these class members did not. However, these class members had their attorneys sign their opt-out letters in their stead. While an attorney's signature did not comply with the literal wording of the court's order, there is little question that the attorney's signature complied with the court order as a matter of law. Both in Alabama, *see* Ala. Code § 34-3-21, and in Pennsylvania, *Tucker v. Tucker*, 87 A.2d 650, 656 (Pa. 1952), attorneys are empowered to sign legal documents on behalf of their clients. Thus whatever the merit of GALIC's technical objection may be, the legal propriety of attorneys signing their clients' opt-out requests cannot be impugned.

Second, even if these class members violated the court's order by failing personally to sign their opt-out requests, we are persuaded that the district court acted within its sound discretion in overlooking the violations in the "interests of justice." *See, e.g., Council on Social Work Educ., Inc. v. Texas Instruments Inc.*, 105 F.R.D. 68, 71 (N.D. Tex. 1985) (collecting cases holding that " 'considerable flexibility' should be used in determining what constitutes an effective request for exclusion").

The class members' violations are in many ways analogous to a party's technical non-compliance with a local rule of court. It is well settled in our circuit that "the district court has considerable leeway in the application of its local rules." *Silberstein v. IRS*, 16 F.3d 858, 860 (8th Cir. 1994). "This court has previously stated that it is for the district court to determine what departures from its local rules of practice may be overlooked." *Trundle v. Bowen*, 830 F.2d 807, 809 (8th Cir. 1987) (citing *Braxton v. Bi-State Dev. Agency*, 728 F.2d 1105, 1107 (8th Cir. 1984));

see Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 611 n.2 (8th Cir. 1994); *United States v. Ford 250 Pickup*, 980 F.2d 1242, 1245 (8th Cir. 1992). We have also held that a district court may, in its discretion, elect not to sanction a party who does not comply with a discovery order. *Hazen v. Pasley*, 768 F.2d 226, 229 (8th Cir. 1985); *cf. Dela Rosa v. Scottsdale Mem'l Health Sys., Inc.*, 136 F.3d 1241, 1243 (9th Cir. 1998) (order) (declining to impose sanctions on attorneys who failed to comply with circuit rules). Our cases plainly suggest that a district court may disregard certain hyper-technical violations of its orders. In the circumstances presented in this case, we do not believe the district court abused its discretion by permitting class members to exclude themselves from the class settlement despite failing to sign their opt-out letters in their own names.

IV

We dismiss James Henderson's appeal, and we affirm the decision of the district court permitting several class members to opt out of the class settlement.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re GENERAL AMERICAN LIFE INSURANCE COMPANY SALES PRACTICES LITIGATION	No. 4:97MD1179 CDP (THIS DOCUMENT RELATES TO *Ludwig v. General American Life Ins. Co.*, No. 4:97CV1820 CDP; *Chain v. General American Life Ins. Co.*, No. 4:97CV1244 CDP; and *Zimmon v. General American Life Ins. Co.*, No. 4:97CV169 CDP)

MEMORANDUM AND ORDER

(Filed Dec. 19, 2000)

On December 15, 2000, I held a hearing to consider the fairness, reasonableness and adequacy of the settlement agreed to in these class-action cases. My Hearing Order dated August 28, 2000, preliminarily approved the class for purposes of settlement and directed that notice of the proposed settlement be sent to the class members. At the December 15 hearing, lead counsel for the plaintiff class appeared, as did counsel for defendant. Also attending were two counsel representing class members who have objected to the settlement, and one objecting class member appearing on his own behalf. I have also considered the written objections filed by several other class members. The parties made arguments and presented extensive written materials, including various declarations and exhibits.

For the reasons that follow, I will approve the settlement agreement. I begin this order by briefly summarizing a few of the arguments and issues presented at the hearing, and then will make my findings and conclusions. I have not attempted to discuss all the issues, and to the extent I have not done so, it is because I agree with the positions taken by lead counsel and defendant in their submissions.

The objectors argue that the class notice was not sufficient, that the settlement is underfunded and not adequate to protect the interests of all the members of the class, that administration of the settlement allows too much discretion on the part of plaintiffs' selected Claims Evaluator, and that the settlement is unfair because it contains the possibility that person whose claims lack any merit at all would not receive any relief at all. The objectors invite me to either rewrite the settlement agreement, or to give "conditional" approval. "Conditional" approval, as they describe it, would mean my suggesting that I approve most of the agreement, but disapprove specific provisions, and my suggestion that I would approve the agreement if those specific provisions were changed as the objectors request. The objectors expect, of course, that this sort of "conditional" approval would then cause the parties to rewrite the settlement in the way the objectors want. I do not agree that it is necessary for me to attempt to order renegotiation of the settlement agreement. I believe that the settlement is fine in its current form, and I will overrule the objections and approve the agreement as negotiated between lead counsel and defendant, and as set forth in the class notice.

The settlement agreement in this case provides a means whereby electing class members can receive cash payments to remedy their claims; class members who have not chosen to elect that remedy will receive in-kind relief. The settlement has a minimum value of $55 million, and an actual value which appears to be significantly higher. Plaintiffs' counsel will select the agent who will evaluate the individual class members' claims and determine the individual relief, so there is no reason to fear that defendant could somehow manipulate the relief to reduce the value of the settlement. Additionally, any attorneys fees awarded will be paid by the defendant in addition to the settlement value, so no class members' claims will be reduced for payment of attorneys fees. In short, I believe that this is a very good settlement for all concerned, and I will approve it.

Lead counsel and defendant have a dispute regarding 54 persons who sought to opt out of the class but failed to comply with all the technical requirements of the class notice for doing so. I have carefully reviewed the issue raised, and believe that plaintiffs are correct in stating that I should accept these opt-outs, despite their technical non-compliance. In the vast majority of the cases, the problem is simply that the notices were received a day or two late, although from the evidence before me, I believe they were timely mailed. Several others were signed by counsel instead of by the individuals. I believe it is in the interests of justice to accept these opt-outs, and so these persons will not be bound by the determination of the class action.

At the hearing we had some discussion regarding whether objectors should now be allowed to opt out of

the class, since I have overruled their objections. I will not allow this, as I do not believe it is in the interests of justice. Only one objector made an argument that it lacked sufficient information to determine whether to opt out, but that objector did make an appropriate election that should adequately protect its interests. This objector did not request that it be allowed to opt out at this late date, and I see no reason to allow either an opt out or a change of election after the deadline set in the class notice.

Defendant requests that the pleadings in these cases be deemed amended to conform to the proof adduced at the fairness hearing, so that the class definition can be deemed to be that set out in the settlement agreement, Hearing Order, and Class Notice. This is a reasonable request, and the pleadings will be deemed so amended.

Based on the evidence submitted to me and on the law, I make the following findings and conclusions.

1. This Court has subject matter jurisdiction over all claims of all Class Members asserted in the Action, subject matter jurisdiction to approve the Settlement Agreement, and personal jurisdiction over all parties to the Action, including all members of the Class.

2. This order applies to *Ludwig v. General American Life Ins.*, No. 4:97CV1820 CDP, *Chain v. General American Life Ins.*, No. 4:97CV1244 CDP, and *Zimmon v. General American Life Ins.*, No. 97CV169 CDP.

3. The best notice practicable under the circumstances was provided to members of the Class and full opportunity was offered to the Class to participate in the

Fairness Hearing. Notice in accordance with the Hearing Order was sent to over 251,000 class members, and was published in 13 newspapers. The parties established an Information Center telephone bank which answered calls from almost 14,000 class members and almost 400 insurance agents. Plaintiffs' counsel participated in the Information Center and through that center spoke to almost 3,000 class members. These results show that the notice in this case was the best practicable under the circumstances, and class members had full opportunity to participate or make their views known.

4. The requirements for class certification under Rule 23, Fed. R. Civ. P., and all other controlling law have been met:

a. **Numerosity**: The Class consists of approximately 250,000 persons or entities who (with certain exceptions described below) have or had an ownership interest in one or more permanent participating ordinary life insurance policies (participating whole life and/or participating universal life insurance policies), including any rider issued in conjunction therewith and/or endorsement attached thereto, issued or assumed by the Company in the United States (including its territories and commonwealths) during the Class Period by General American Life Insurance Company. For such universal life policies, the Class Period is from January 1, 1982 through December 31, 1996. For such whole life policies, the Class Period is from January 1, 1984 through December 31, 1996. The Class is ascertainable from the Company's records and other objective criteria, and the Class Members are so numerous that their joinder before the Court would be impracticable.

b. **Commonality**: Plaintiffs have alleged numerous questions of fact and law common to the Class, including whether defendant engaged in a nationwide common course of conduct regarding its sale of universal life and whole life policies involving (i) dividends, policy interest crediting and policy charge determinations; (ii) policy illustration practices; (iii) uniform sales practices relating to the sale of defendant's policies on the basis of the "vanishing premium" or "disappearing premium" concept; (iv) improper replacement or churning of existing policies into policies issued by General American; and (v) the sale of life insurance policies as "investment plans," "savings plans" and "retirement plans." Considering the allegations of the complaints, I find that these common questions of fact and law predominate over questions of fact and law affecting only individual members of the Class.

c. **Typicality and Adequacy of Class Representation**: Based on plaintiffs' allegations that defendant engaged in uniform conduct and made similar untrue or incomplete statements to members of the Class, I find that the claims of the representative plaintiffs are typical of the claims of the Class, and that the representative plaintiffs and their attorneys will fairly and adequately protect the interests of the Class, in that (i) the interests of the named plaintiffs and the nature of their alleged claims are consistent with those of all members of the Class, (ii) there appear to be no conflicts between or among the named plaintiffs and the Class Members, (iii) the named plaintiffs have been and appear to be capable of continuing to be active participants in both the prosecution and the settlement of the Actions, and (iv) the

named plaintiffs and the Class Members are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated class actions, particularly those involving the types of insurance sales practice claims alleged in the Actions.

5. I find that a resolution of the Actions in the manner proposed by the Settlement Agreement is superior to other available methods for a fair and efficient adjudication of the Actions. The settlement involves (a) General Policy Relief, which provides Class Members with opportunities to receive new death benefits free of charge, as well as payments or credits in the form of dividend interest benefits and dividend mortality benefits, and (b) a Claim Evaluation Process, which permits Class Members to obtain individualized forms of relief based on predetermined guidelines, which I have reviewed. I note that the Claim Evaluation Process offers an efficient, uniform means to identify and resolve complaints without burdening the courts or regulators. I also note that, because the Actions are being settled, rather than litigated, I need not consider manageability issues that might be presented by the trial of a nationwide class action involving the issues in this case. In making these findings, I have considered, among other factors, (a) the interests of Class Members in individually controlling the prosecution or defense of separate actions; (b) the impracticability or inefficiency of prosecuting or defending separate actions; (c) the extent and nature of any litigation concerning these claims already commenced; and (d) the desirability of concentrating the litigation of the claims in a particular forum.

6. **Class Certified**: Based on the foregoing findings, I certify the Class for settlement purposes only under Fed. R. Civ. P. 23(b)(3).

The Class consists of all persons and entities ("Class Members") who had, at any time during the Class Period, as set forth in paragraph 4(a) above, an ownership interest in one or more permanent participating ordinary life insurance policies (participating whole life insurance policies, and/or participating universal life insurance policies), including any rider issued in conjunction therewith and/or endorsement attached thereto, issued or assumed by the Company in the United States (including its territories and commonwealths) with an Issue Date during the Class Period (collectively, the "Policies"), except for the following:

a. policies issued on Form Nos. 10072, 81026, 81027, or 84WL in classes where the dividends are experience rated by payor;

b. policies issued on Form Nos. 40006, 10003, or policies with externally indexed crediting rates;

c. policies terminated prior to January 1, 1988;

d. variable policies which are issued pursuant to a registration statement filed with the United States Securities and Exchange Commission or pursuant to a private placement; or

e. certain corporate owned life insurance ("COLI").

The Class certified by this Court does **not** include (unless such persons or entities are Class Members by virtue of their ownership interest in other Policies):

i. any person or entity who, while represented by legal counsel, signed a document that releases General American from any claims concerning any Policy;

ii. any person or entity who has or had ownership of a Policy that is timely and properly excluded from the Class pursuant to Section VIII. of the Settlement Agreement;

iii. any person or entity who has or had ownership of a policy, where a death benefit was paid or is payable under the base coverage due to the death of all of the insureds before the Eligibility Date (as defined in the Settlement Agreement);

iv. any person or entity that has pending as of the date this Order is entered any lawsuit, arbitration or court-supervised alternative dispute resolution proceeding arising out of the same facts or transactions, in whole or in part, as alleged in the Actions;

v. any person or entity that has completed adjudication or a mutually agreed to arbitration or mediation of a claim against General American where the claim arises out of the same facts or circumstances, in whole or in part, that are the subject of the Actions;

vi. any insurance company that has or had ownership of a policy pursuant to an absolute assignment effected as part of an exchange under Section 1035 of the Internal Revenue Code;

any person who is a current or former director or officer of General American; or

vii. any person or entity that is not a resident of the United States as of the Notice Approval Date and has or had an ownership interest in a terminated policy.

The court finds that, for the sole purpose of settlement, and without an adjudication of the merits, the Class is sufficiently well-defined and cohesive.

7. **Findings Regarding Proposed Settlement:** I find that (a) the proposed settlement resulted from extensive arm's-length negotiations and was concluded only after counsel for plaintiffs had conducted adequate discovery (including review of approximately 90,000 pages of documents produced by defendant and 78 compact disks and floppy disks containing marketing and sales material, deposing General American officers and employees and consultation with independent experts about the issues raised by plaintiffs' claims), and only after counsel for General American conducted a thorough examination and evaluation of the relevant law, facts and allegations to assess the merits of plaintiffs' claims, including reviewing numerous documents produced by plaintiffs and their counsel and deposing all of the class representative plaintiffs; and (b) the proposed settlement evidenced by the Settlement Agreement is fair, reasonable, adequate, consistent and in compliance with all applicable legal requirements, and is in the best interest of the parties and the Class.

Accordingly,

IT IS HEREBY ORDERED that the parties' proposed settlement agreement, filed with this Court on August 24,

2000, and preliminarily approved by order dated August 28, 2000, is finally approved.

IT IS FURTHER ORDERED that all objections to the settlement are overruled.

IT IS FURTHER ORDERED that the motions to intervene of James Henderson and Karen Shapiro [#156, #157] are denied.

IT IS FURTHER ORDERED that all persons listed in Exhibit A as well as those listed in section 1 of Plaintiffs' and Defendant's Joint Submission of Requests for Exclusion filed with the Court on December 15, 2000, are deemed to have timely and properly elected to be excluded from the Class, and said persons will not be bound by the settlement in this case.

IT IS FURTHER ORDERED that the complaints are deemed amended to conform to the proof so that the class definition is that contained in this Order, the Settlement Agreement, the Hearing Order, and the Class notice.

IT IS FURTHER ORDERED that a hearing on plaintiffs' claims for attorneys fees will be held on Thursday, February 1, 2001, at 9:30 a.m., Thomas F. Eagleton Courthouse, 111 S. 10th Street, Courtroom 14 South.

A separate Judgment in accord with this order is entered this same date.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 19th day of December, 2000.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1264

In re: General American Life Insurance Company Sales Practices Litigation	
Lewis & Ellis, Inc.; Karen Shapiro, Movants, James Henderson, Appellant, William P. Ludwig; Jeffrey L. Sippil; Darrell D. Cunningham; John R. D'Alessandro; Bobby L. Chain; Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities, Appellees, v. General American Life Insurance Company, Appellee.	Appeals from the United States District Court for the Eastern District of Missouri (Filed Nov. 21, 2001)

No. 00-1453

William P. Ludwig; Jeffrey L. Sippil; Darrell D. Cunningham; John R. D'Alessandro; Bobby L. Chain; Howard L. Zimmon, Trustee, Howard M. Newburg Trust U.T.A. 5/21/92, Individually and on Behalf of All Others Similarly Situated and representative capacities,

Plaintiffs,

Carl Kelly Paving, Inc.; William Boje; Katherine Zoghby; Gloria Boje; Carol Singley Carroll; L. Henry Gissel, Jr.; Preston Reeves; Dennis Linsey; Ross J. Love, Jr.; James L. Carroll; James N. Dickson; Howard Patterson; Charles E. Patterson; Pat's Auto Parts, Inc.; Rahernat Amarshi; Amin Amarshi; Cynthia Stanley; Billy McNurlen; Patricia McNurlen; Mary Lewis; Gregory Harris; Jack Leinenweber; Roger E. White, Trustee, Oliver Kitchens Family Trust; David Garrett; William Gabriel; Sule Alli;

Thomas Crovella; Larry Morris; Charles Hoskins; George Linsey; Oliver Kitchens; Tommy Rogers; Betty Rogers; George Moore; Jon French; Dr. Lindsey Jones, Jr.,	* * * * * * * * * *
Appellees,	* * *
v.	* *
General American Life Insurance Company,	* * *
Appellant.	* *

JUDGMENT

These appeals from the United States District Court were submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in cause 01-1264 is dismissed for lack of jurisdiction and the judgment in the district court in cause 01-1453 is affirmed, in accordance with the opinion of this Court.

(5172-010199)

October 16, 2001

A true copy

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
FEB 21 2002
CLERK

No. 01-1068

In The

Supreme Court of the United States

JAMES HENDERSON,

Petitioner,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT GENERAL AMERICAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRYAN CAVE LLP

CHARLES A. NEWMAN
(Counsel of Record)
BRUCE C. OETTER
JOHN W. ROGERS
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000 (Phone)
(314) 259-2020 (Fax)

Attorneys for Respondent General American Life Insurance Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

148

QUESTIONS PRESENTED

1. Whether this case is moot in light of the district court's judgment approving the settlement – which was not stayed – and the ensuing implementation of the settlement – which cannot now be undone.

2. Whether petitioner lacks standing to contest the approval of a class-action settlement when he has elected not to participate in the very provisions that he seeks to challenge.

3. Whether this Court should hold this case in light of *Devlin v. Scardelletti*, No. 01-417, considering the legal infirmities of the petitioner and the mootness of the petition.

CORPORATE DISCLOSURE STATEMENT

Respondent General American Life Insurance Company ("General American") is a wholly-owned subsidiary of GenAmerica Financial Corporation, which is a wholly-owned subsidiary of Metropolitan Life Insurance Company, Inc., which is a wholly-owned subsidiary of MetLife, Inc. MetLife, Inc. is publicly-traded on the New York Stock Exchange under the symbol "MET."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

A. The Implementation of the Settlement Cannot Be Undone 1

B. Petitioner Did Not Seek CEP Relief and Therefore Lacks Standing To Challenge Any CEP Provisions of the Settlement 3

COUNTER-STATEMENT OF THE CASE 4

REASONS FOR DENYING THE PETITION 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987) 8

In re Brand Name Prescription Drugs Antitrust Litigation, 115 F.3d 456 (7th Cir. 1997) 4

In re Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977) 3

In re Integra Realty Resources, Inc., 262 F.3d 1089 (11th Cir. 2001) 4

In re Public Serv. Co., 963 F.2d 469 (1st Cir. 1992), *cert. denied sub nom. Rochman v. Northeast Utilities Serv. Co.*, 506 U.S. 908 3

In re Vitamins Antitrust Class Actions, 215 F.3d 26 (D.C. Cir. 2000) 4

Mills v. Green, 159 U.S. 651 (1895) 3

Scardelletti v. Debarr, 265 F.3d 195 (4th Cir. 2001), *cert. granted sub nom. Devlin v. Scardelletti*, 122 S.Ct. 663 (Dec. 10, 2001) (No. 01-417) 7, 8, 9

Thibaut v. Ourso, 705 F.2d 118 (5th Cir. 1983) 3

United Automobile Workers v. Scofield, 382 U.S. 205 (1965) 8

STATEMENT OF JURISDICTION

Apart from petitioner's lack of standing for failure to intervene, there are two further bars to the grant of the petition. First, petitioner did not obtain a stay of the district court's judgment approving the settlement, and the settlement has been implemented. Thus, as a matter of law and business reality, the implementation of this $55 million settlement involving more than 251,000 class members cannot now be undone and, accordingly, the issues raised by the petition are moot. Second, petitioner lacks standing to challenge a portion of the settlement in which he has elected not to participate.

A. The Implementation of the Settlement Cannot Be Undone.

The parties agreed to, and the district court approved, a settlement providing approximately $55 million of relief for over 251,000 class members. Neither petitioner nor anyone else obtained a stay of that judgment. Since that time, the settlement has been substantially effectuated:

- On June 1, 2001, General American fully implemented the General Policy Relief ("GPR") component of the settlement and began to provide benefits worth approximately $34 million to the class members who elected GPR;
- To date, 384 class members have died since December 31, 2000 (the effective date of the settlement), and General American has paid death benefits of $177,820.64 for 72 of those class members. Efforts are currently

under way to pay death benefits of $854,634 for the other 312 deceased class members;

- On June 1, 2001, General American fully funded the Claims Evaluation Process ("CEP") component of the settlement with $21 million (plus interest);

- Class members who elected CEP have provided information concerning their claims to the Claim Evaluator, and General American has spent considerable time and expense providing documentation to the Claim Evaluator for these claims;

- The Claim Evaluator is in the process of evaluating the claims and has already incurred substantial fees and expenses; and

- Pursuant to the district court's post-judgment order, General American paid $12.1 million in attorneys' fees to class counsel on November 16, 2001.

It is too late for this settlement to be unwound. General American cannot now take back the GPR benefits it has already provided to class members. Nor can it recover the $21 million for the CEP or the $12.1 million in attorneys' fees it has already paid. The families and beneficiaries of those class members who have died – who are not themselves parties to this action – cannot be ordered to return the $177,820 in death benefits they have received.

The belated relief petitioner seeks would require a complete dismantling of the entire settlement. It is simply too late to unscramble those eggs. General American (and

the class) relied on the district court's judgment approving the settlement – which was not stayed – and cannot now be returned to the settlement negotiating table in the same position that it occupied before. *See Mills v. Green*, 159 U.S. 651 (1895). In *Thibaut v. Ourso*, 705 F.2d 118, 120-21 (5th Cir. 1983), the court summarized the applicable rule:

> "[I]n the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree. As a result, the court of appeals may become powerless to grant the relief requested by appellant. Under such circumstances, the appeal will be dismissed as moot."

See also In re Public Serv. Co., 963 F.2d 469 (1st Cir. 1992) *cert. denied sub nom. Rochman v. Northeast Utilities Serv. Co.*, 506 U.S. 908; *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). The prejudice to General American and the class by this "twelfth hour" petition without any prior stay or bond is extreme. This action is now moot and accordingly the petition should be denied.

B. Petitioner Did Not Opt for CEP Relief and Therefore Lacks Standing To Challenge any CEP Provisions of the Settlement.

Petitioner did not elect to participate in the CEP portion of the settlement (requiring submission and evaluation of individual claims) and has instead accepted the GPR relief (which is automatic and "no fault"). He thus has no standing to challenge any alleged unfairness or inadequacy of the CEP provisions of the settlement. Petitioner is in the same posture as one who opts out of a

settlement entirely and then attempts to appeal the approval of its terms. In that situation, one who opts out cannot be heard to argue that the settlement is unfair or inadequate – or that they would have joined the settlement if it had different terms. They simply have no standing to contest the settlement because it does not affect them. *See, e.g., In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1102 (11th Cir. 2001); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 28-29 (D.C. Cir. 2000); *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456, 457 (7th Cir. 1997). Petitioner's challenge to the fairness of the CEP that he has rejected is indistinguishable, and his petition should be denied.[1]

COUNTER-STATEMENT OF THE CASE

Respondent incorporates by reference the statement of facts in the opinion of the Eighth Circuit. Beyond that, it is only necessary to more fully describe the CEP provisions of the settlement to which petitioner objects and to correct certain points in petitioner's statement of the case related to the implementation and evaluation of the CEP.

[1] Respondent raised this argument below, but the Eighth Circuit in dismissing petitioner's appeal did not reach it. Consequently, petitioner's statement is incorrect that "[i]t is undisputed that if objectors need not be intervenors to have appellate 'standing' to appeal approval of a class action settlement, the Eighth Circuit would have reached the merits of petitioner's appeal rather than dismissing his appeal for lack of jurisdiction." Pet. at 2.

The CEP provides class members with a simple process to resolve promptly any complaints relating to the purchase of a General American life insurance policy and to obtain relief tailored to the nature and strength of their claims. The Claim Evaluator uses guidelines proposed by class counsel, agreed to by the parties and approved by the district court, and reviews claims and awards relief without any involvement by General American. The Claim Evaluator is class-member-friendly – a person hired by class counsel, paid by class counsel out of the CEP Fund, and whose activities are monitored and controlled by class counsel. The Claim Evaluator is not a neutral arbiter, but rather a person who is an advocate for class members and whose function is to distribute up to $21 million to them.

The sole provision of the Stipulation to which petitioner objects (Pet. at 5) states:

> **Level Zero Claims:** Claims shall be designated Level Zero Claims if they are contradicted by Documentation or if, in the discretion of the Claim Evaluator, the Claim otherwise deserves such designation, and they shall not be entitled to any relief.

The function of the Claim Evaluator is to ensure that the CEP Fund is appropriately distributed to deserving class members – not to persons who have no claim but nonetheless seek a windfall from the CEP. Granting the Claim Evaluator the ability to designate a claim at a Level Zero is necessary to protect the integrity of the CEP; otherwise, unscrupulous claimants could unfairly obtain a portion of the CEP Fund that should be available to more deserving class members. It also addresses the patently frivolous

claim (*i.e.*, one that is "contradicted by Documentation"). In addition, the settlement provides detailed guidance to the Claim Evaluator in categorizing and scoring claims, and the Claim Evaluator must follow it.

Petitioner ignores the fact that the language of which he complains is contained in the relevant criteria that the Claim Evaluator should consider in scoring all claims. That is, in designating a particular claim as Level Three, Level Two, or Level One, the Stipulation permits such a score if, "[i]n the discretion of the Claim Evaluator the Claim otherwise deserves such designation." Further, the discretion is not unfettered, but is guided by detailed criteria developed by class counsel designed to benefit class members.

Petitioner describes the CEP as a process in which General American "submits documents, presumably to contradict the claims of the class member." Pet. at 4. Petitioner's speculation is baseless: the CEP is not an adversarial process, and General American gets none of its $21 million back if a class member's claim is denied. If any class members who elected CEP score a zero on their claim, any additional CEP funds are available for distribution to other CEP claimants. If any of the $21 million remains in the CEP Fund after all relief is awarded to class members and the costs of CEP administration have been paid, such remaining funds "spill over" and are automatically distributed to class members not electing CEP, including petitioner, through the GPR. Hence, petitioner, not General American, possibly benefits from the designation of a specific claim as a Level Zero Claim.

Finally, petitioner contends that the decision of the Claim Evaluator is final and not subject to appeal. Pet. at 5. This provision of the CEP is for the benefit of class members, not General American. Based on their experience with an adversarial CEP, class counsel insisted on having the decision of the Claim Evaluator be final and not subject to appeal by any class member. This provision avoids the delay, cost, and inefficiencies of an adversarial claim evaluation process, which comes out of the funds that would otherwise be distributed to class members.

REASONS FOR DENYING THE PETITION

PETITIONER HAS WAIVED THE ARGUMENT PRESENTED BY *DEVLIN V. SCARDELLETTI*, NO. 01-417.

Petitioner asserts that his petition presents the same "standing" question this Court has agreed to hear in *Devlin v. Scardelletti*, 122 S.Ct. 663 (Dec. 10, 2001) (No. 01-417). Not so. Unlike *Devlin*, petitioner did not appeal the denial of his motion to intervene and never argued below that he had standing to appeal even if he was not allowed to intervene. Instead, petitioner (a) exclusively argued the merits of the settlement agreement in his Opening Brief; (b) asserted in his Reply Brief that he had appealed the denial of his motion to intervene – although the issue was never mentioned in his Opening Brief – because that order was part of the final judgment from which he had appealed; and (c) never once challenged the district court's denial of leave to intervene or argued that he would have standing to appeal even if he was not allowed to intervene. As correctly noted by the Eighth

Circuit: "Henderson neglects to identify the intervention question as an issue in his Statement of Issues, and he does not even mention the word 'intervenes' in his brief." (Pet. Apdx. 10). Therefore, wholly apart from the multiple and significant jurisdictional impediments to his petition, petitioner's attempted wholesale transformation of his position below, in order to piggyback on *Devlin*, should be rejected.

In *Scardelletti v. Debarr*, 265 F.3d 195, 198-99 (4th Cir. 2001), Devlin argued both that he was entitled to intervene below *and* that even if the district court properly denied his motion to intervene, he nevertheless had standing to appeal the approval of the settlement. Here, on the other hand, petitioner neither appealed the denial of his motion to intervene *nor* argued that he nevertheless had standing to appeal. Rather, the Eighth Circuit concluded that he never appealed the denial of his motion to intervene and thus dismissed his appeal. This case is thus fundamentally different than both *Devlin* and *United Automobile Workers v. Scofield*, 382 U.S. 205, 208-09 (1965), in which this Court held that a would-be, but unsuccessful, intervenor has standing to seek certiorari from the action of a court of appeals denying intervention.

More importantly, however, petitioner never argued that he would have standing to appeal – as an objecting class member – even if he was not allowed to intervene. It is well-settled that this Court does not ordinarily decide questions not raised or litigated in the lower courts. *See, e.g., City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing writ as improvidently granted for failure to raise issue in court of appeals). This case does not

present the question raised by *Devlin* and belatedly asserted by petitioner in this Court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRYAN CAVE LLP

CHARLES A. NEWMAN
(*Counsel of Record*)
BRUCE C. OETTER
JOHN W. ROGERS
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

February 2002

Supreme Court, U.S.
FILED
FEB 22 2002

No. 01-1068

In The

Supreme Court of the United States

JAMES HENDERSON,

Petitioner,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MILBERG WEISS BERSHAD HYNES & LERACH LLP
JOHN J. STOIA, JR.
(*Counsel of Record*)
TIMOTHY G. BLOOD
LESLIE E. HURST
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

SMITH, PHILLIPS, MITCHELL & SCOTT
RICHARD PHILLIPS
P.O. Drawer 1586
Batesville, MS 38606
Telephone: 662/563-4613

Co-Lead Counsel for Respondents
William P. Ludwig, Jeffery L. Sippil, Darrell D. Cunningham, Bobby L. Chain, Howard L. Zimmon, Trustee, Howard M. Newburg Trust 5/21/92

[Additional Counsel Appear On Signature Page.]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Petitioner is an unnamed class member in a federal class action. He wished to raise an objection to a portion of a proposed settlement and moved to intervene in the district court. After his motion to intervene was denied and his objection overruled, petitioner appealed, challenging only the ruling on the objection, thereby waiving all issues related to intervention. The question presented is:

> Whether an unnamed class member who waives all issues on appeal related to intervention should now have his petition granted on intervention issues solely because the Court has granted review in another case?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE..... 2

III. REASONS FOR DENYING THE PETITION.... 6

IV. CONCLUSION..... 9

TABLE OF AUTHORITIES

Page

CASES

Straight v. Wainwright, 476 U.S. 1132 (1986) 6

United States v. Williams, 504 U.S. 36 (1992) 8

Yee v. City of Escondido, 503 U.S. 519 (1992) 1, 8

STATUTES, RULES AND REGULATIONS

Federal Rules of Civil Procedure
Rule 24(a) 3

I. INTRODUCTION

Petitioner James Henderson is an unnamed class member who objected to a portion of a class action settlement despite the fact that he was in no way affected by that aspect of the settlement. Henderson also attempted to gain party status by a motion to intervene filed in the Eastern District of Missouri. The district court denied Henderson's motion to intervene and overruled his objection to the settlement. On appeal to the Court of Appeals for the Eighth Circuit, Petitioner devoted the entirety of his four-page argument (devoid of citations to authority) to the order overruling his objection to the settlement. Henderson did ***not*** challenge the order denying intervention or otherwise contend the district court erred in denying him party status.

As the Eighth Circuit held, Henderson "neglects to identify the intervention question as an issue in his Statement of Issues, and he does not even mention the word 'intervene' in his brief. By failing to raise the intervention issue, Henderson has waived the issue and effectively conceded his non-party status." A9-10.[1] Because Henderson had not raised the issue, the Eighth Circuit did not address the denial of intervention or the controlling precedent requiring intervention by non-parties to appeal approval of a class action settlement – the very issue on which Petitioner now seeks review.

Plenary review is rarely granted on an issue that was neither pressed nor passed upon below. *Yee v. City of*

---

[1] "A___" refers to Appendix to Petition for Writ Certiorari.

Escondido, 503 U.S. 519, 533 (1992). Recognizing this, Henderson asks the Court to "hold" his petition pending the Court's resolution of *Devlin v. Scardelletti*, No. 01-417, granted review on December 10, 2001. However, a "hold" is not appropriate under the circumstances of this case. The rationale for holding a petition pending the disposition of another case is that review should not be denied simply because the earlier petition was the first to raise the same issue. Here, had Petitioner filed first, certiorari would have been denied as the question presented was neither raised nor passed upon below. Moreover, the balance of equities weighs against holding this petition. Petitioner's objection is to a portion of the settlement that does not affect him. Yet, by this petition, he is holding up cash settlement payments to over 3,400 class members.

II. STATEMENT OF THE CASE

This case involves three nationwide class actions filed against respondent General American Life Insurance Company ("General American") and consolidated by the Judicial Panel for Multi District Litigation in 1997 for pretrial proceedings in the Eastern District of Missouri. The actions allege that General American manipulated dividends, interest crediting rates and other actuarial factors, enabling it to misrepresent the performance and characteristics of the life insurance policies purchased by class members. As a result of the misrepresentations, class members bought policies that General American knew would not perform as promised. Consequently, the class lost millions of dollars in premium payments, policy values and sometimes their life insurance coverage.

After two and one-half years of litigation and almost two years of settlement negotiations, the parties reached a settlement. Under the terms of the settlement, class members have a choice between two broad forms of relief, either automatic General Policy Relief ("GPR") or participation in the Claim Evaluation Process ("CEP"). A24. The CEP is a cost-free, simple process for class members to resolve complaints relating to their insurance policies. Claims are reviewed and scored by a third-party Claim Evaluator selected and trained by plaintiffs' lead counsel. A20. Nearly all CEP participants receive a cash payment, often in the thousands or tens of thousands of dollars. In addition to GPR and CEP, the settlement provides "Prospective Performance Undertaking" relief, whereby General American is prohibited from lowering below negotiated levels its policies' dividend scales and interest crediting rates for a period of four years after the final settlement date. Petitioner chose GPR and, unlike those who chose CEP, is receiving his settlement benefits despite the delay in the judgment becoming final as a result of his petition.

On the last possible day to object, Petitioner filed an objection to the settlement claiming that because of one aspect of CEP scoring, the entire settlement was fundamentally unfair. Petitioner himself is unaffected by the scoring since he chose GPR. CR 165, 166, 170.[2] On the same day, Petitioner also moved to intervene and obtain party status pursuant to Fed. R. Civ. P. 24(a). In opposition, Respondents argued, among other things, that Petitioner was represented by a group of lawyers whose

---

[2] "CR___" refers to the district court docket.

practice largely consists of filing last minute, frivolous objections to class action settlements, then seeking fees to withdraw the objections. Their strategy, which they have employed time and again, is to file objections to the settlement on the last day permitted, move to intervene, request that discovery be reopened and then make demands designed to delay implementation of the settlement so that the parties will ultimately be forced to pay them.[3] In this case, the parties refused Petitioner's demands, trusting that the district court would overrule the meritless objection and deny party status to a class member seeking to improperly advance his individual interests at the expense of other class members.

After a full hearing at which Petitioner's counsel attended and participated, the district court approved the

---

[3] Petitioner's counsel have filed substantially similar objections and intervention briefs for the purpose of holding up settlements in numerous cases, including: *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000); *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, MDL No. 1105 (REK), Master Docket No. 1:96-11534-REK (D. Mass. C.A. Oct. 3, 2000); *McNeil v. American General Life & Accident*, Case No. 3:99-1157 (M.D. Tenn. Sept. 8, 2000); *Jordan v. State Farm Life Ins. Co.*, Case No. 97 CH 11 (McLean County, Ill. March 26, 1999); *Garst v. Franklin Life Ins. Co.*, Case No. 97-N-0074-S (N.D. Ala.); *Lee v. USLife Corp.*, Case No. 1:97-CV-55-M (W.D. Ky.); *Manners v. American General Life Ins. Co.*, No. 3-98-0266 (M.D. Tenn.); *Moody v. American General Life and Accident Co.*, Case No. CI0199701525 (C.P. Lucas County, Ohio); *In re Metropolitan Life Ins. Co. Sales Practices Litig.*, MDL No. 1091, Master Docket No. 96-179 (W.D. Pa. July 26, 2000); *Sternberg v. Apple Computer, Inc.*, Case No. CV788574 (Super. Ct. Santa Clara County, Cal.); *Gordon v. Apple Computer, Inc.*, Case No. CV790452 (Super. Ct. Santa Clara County, Cal.).

settlement, denied Petitioner's motion to intervene and overruled his objection to the settlement. A18, 28. Approving the settlement, the district court determined that the minimum value of the settlement was $55 million ($21 million in the CEP fund; $34 million in General Policy Relief). A20. This value does not include attorneys' fees and expenses (which were paid separately by General American), nor does this amount include the value of the Prospective Performance Undertaking.

Petitioner then appealed to the Court of Appeals for the Eighth Circuit, delaying implementation of the settlement pending resolution of the appeal. Petitioner posted no bond. On appeal, Petitioner did not contest the denial of intervention. Instead, his four-page appeal was devoted entirely to arguing his objection to the settlement. He cited no legal authority other than one case on the standard of appellate review. By motion to the court, Henderson waived oral argument on his appeal and did not attend the appellate court hearing.

The Eighth Circuit ruled that by failing to contest or to even mention intervention, Petitioner had waived the issue, was not a party to the proceedings and therefore lacked standing to appeal. The appeals court did not consider or pass upon the propriety of the Eighth Circuit precedent requiring successful intervention to have standing to appeal. A8-11. Nonetheless, Petitioner now asks the Court to review precisely that issue even though it was not addressed.

III. REASONS FOR DENYING THE PETITION

On December 10, 2001, the Court granted certiorari in *Devlin v. Scardelletti*, No. 01-417. Argument is set for March 26, 2002. The question presented in *Devlin* is whether an unnamed class member, whose petition to intervene was denied, has standing to appeal the district court's approval of the settlement. *See Devlin*, Petition for Writ of Certiorari. Here, Petitioner asks the Court to hold his petition pending decision in *Devlin*, or in the alternative to grant plenary review.

Henderson's petition should not be held pending the disposition of *Devlin*. One reason for holding a petition pending decision of a similar case is that "like cases must be treated alike." *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan/Marshall, J.J. dissenting). The rationale is that "whether an individual obtains relief should not turn on the fortuity of whether his papers were the first, the second or the tenth to reach the Court. What counts is the merits." *Id.*

Here, the cases are not alike because Petitioner would not be granted review on the merits. Henderson waived the issue for which he now seeks review. And, unlike the lower courts in *Devlin*, here neither the Eighth Circuit nor the district court considered the question presented, so there is no record in this case that can contribute to resolution of the issue. Therefore, whether Henderson obtains relief does not depend on the fortuity of when his petition was filed. Rather, Henderson simply clings to the coattails of *Devlin* to evade his prior waiver.

Holding this petition will also substantially prejudice class members still waiting for their settlement relief.

Pursuant to the terms of the settlement, implementation of all settlement relief to all class members was deferred while Petitioner appealed to the Eighth Circuit. Petitioner posted no bond to appeal. Upon dismissal of the appeal, the parties began implementing certain aspects of the settlement. General Policy Relief (GPR) is being paid and all CEP claims have been submitted to the Claim Evaluator, who has started the review and scoring procedure. However, the settlement does not permit any CEP payments to be made until the judgment becomes final. If this petition is held, Henderson will have effectively stayed implementation of the CEP payments pending the Court's resolution of an issue in another case, that Petitioner did not consider important enough to raise himself in the lower courts. Meanwhile, over 3,400 class members must await their relief (typically thousands of dollars) while most must continue to pay their policy premiums out-of-pocket, or face losing their life insurance coverage. Such a stay will have no negative effect on Henderson, as he did not choose to seek CEP relief, but instead chose to receive GPR benefits. CR 165, 166, 170.

Nor should Henderson's petition be granted plenary review. The question presented by Henderson, similar to *Devlin*, is whether an unnamed class member has standing to appeal approval of a class action settlement even though his motion to intervene was denied. P.(i). Henderson did not present this issue to either the district court or the Eighth Circuit. It is undisputed that Henderson did not challenge the order denying intervention, neglecting "to identify the intervention question as an issue in his Statement of Issues, and he does not even mention the word 'intervene' in his brief." A9-10.

In his reply brief to the Eighth Circuit, Petitioner asserted that he did challenge denial of intervention by designating the district court's order in his notice of appeal. The Eighth Circuit rejected this theory because (i) issues not argued in an opening brief cannot be raised for the first time in reply, and (ii) designating a court order in a notice of appeal, without more, is insufficient to raise the issue. A10.

Were the Court to grant plenary review, it would be reviewing an issue not presented below, not briefed below, not argued below and not determined below. Traditionally, the Court has declined to do this. *United States v. Williams*, 504 U.S. 36, 58 (1992) (traditional rule precludes a grant of certiorari if question presented was not pressed or passed upon below); *Yee*, 503 U.S. at 538 ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.").

IV. CONCLUSION

For the reasons given, the petition for writ of certiorari should be denied.

February 22, 2002

Respectfully submitted,

MILBERG WEISS BERSHAD
HYNES & LERACH LLP
JOHN J. STOIA, JR.
(*Counsel of Record*)
TIMOTHY G. BLOOD
LESLIE E. HURST
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

SMITH, PHILLIPS, MITCHELL & SCOTT
RICHARD PHILLIPS
P.O. Drawer 1586
Batesville, MS 38606
Telephone: 662/563-4613

Co-Lead Counsel for Respondents

HOPKINS GOLDENBERG, P.C.
MARK C. GOLDENBERG
ELIZABETH V. HELLER
2227 South State Route 157
Edwardsville, IL 62025
Telephone: 618/877-0088

Liaison Counsel for Respondents

Supreme Court, U.S.
FILED
MAR 28 2002
OFFICE OF THE CLERK

(4)

No. 01-1068

In The

Supreme Court of the United States

JAMES HENDERSON,

Petitioner,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

PAUL S. ROTHSTEIN
626 N.E. First Street
Gainesville, FL 32601

FRANK H. TOMLINSON
PRITCHARD, MCCALL & JONES, LLC
800 Financial Center
Birmingham, AL 35203

ROBERT P. CUMMINS
THOMAS C. CRONIN, JR.
(Counsel of Record)
CUMMINS & CRONIN, LLC
77 West Wacker Drive, Suite 4800
Chicago, IL 60601
(312) 578-0500

March 28, 2002

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

388

REASONS FOR GRANTING THE WRIT

Respondents' brief in opposition to the Petition for Certiorari is misleading. It is immaterial whether Petitioner challenged the District Court's denial of his motion to intervene in his appeal to the Eighth Circuit. The issue in this Petition is exactly the same as in *Devlin* – whether intervention must be obtained by an absent class member who objects to a class action settlement to have standing to appeal. Petitioner, like the petitioner in *Devlin*, is urging this Court to adopt the position of the Second, Third, and Ninth Circuits in *Kaplan vs. Rand*, 192 F.3d 60, 67 (2d Cir. 1999); *Carlough vs. Amchem Products*, 5 F.3d 707, 710 (3d Cir. 1993) and *Marshall vs. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977), which do not require intervention to confer standing on a class member to appeal an order approving a class action settlement. See Petition, p. 8. In fact, in *Kaplan*, the Appellant class member was granted standing to appeal the settlement as an objector even though he had not even **moved** to intervene in the District Court. *Kaplan*, 192 F.3d at 67.

In this respect, the instant Petition is identical to *Devlin*. Should this Court accept the arguments urged by the Petitioner in *Devlin*, intervention in the District Court would not be necessary for appellate standing. The Eighth Circuit would therefore be required to address the **merits** of the appeal even though Petitioner did not raise the issue of intervention in his initial brief to the Eighth Circuit.

Likewise, the same arguments apply to Petitioner's request for plenary review, as an alternative to holding this Petition pending this Court's decision in *Devlin*. It is

illogical to require the Petitioner to have appealed the denial of his motion to intervene in the lower appeal if this Court adopts the rule of the Second Circuit which would not even require Petitioner to **move** for intervention. Put differently, if there were no intervention requirement, the Eighth Circuit would have reached the merits of Petitioner's appeal, just as is the case in *Devlin*, if the Petitioner there had not been burdened with the intervention requirement.

CONCLUSION

This Petition should be held pending this Court's decision in *Devlin* and disposed of in a manner consistent with that decision; otherwise the Court should grant the Petition for plenary review.

Respectfully submitted,

PAUL S. ROTHSTEIN
626 N.E. First Street
Gainesville, FL 32601

FRANK H. TOMLINSON
PRITCHARD, MCCALL & JONES, LLC
800 Financial Center
Birmingham, AL 35203

ROBERT P. CUMMINS
THOMAS C. CRONIN, JR.
(Counsel of Record)
CUMMINS & CRONIN, LLC
77 West Wacker Drive, Suite 4800
Chicago, IL 60601
(312) 578-0500